PRIOR CONVICTION IMPEACHMENT: THE NEED FOR REFORM

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INTRODUCTION

In all but three states, prior convictions are routinely introduced under the rules of evidence with the ostensible purpose of impeaching the credibility of both defendants and other witnesses.[1] This practice of impeachment by prior conviction is an antiquated anachronism that is both indefensible under its stated rationale and a prime perpetuator of racial bias in both the criminal and civil legal systems. Although the stated rationale for impeaching with prior convictions is to shed light on a witness's "propensity for truthfulness," prior convictions have no established predictive connection to a witness's truthfulness or untruthfulness. Instead, the potential for impeachment with prior convictions silences defendants, deters or diminishes vital witness testimony, offers powerful leverage for prosecutors in the context of plea agreements, and influences settlement negotiations, despite having no necessary relevance to determining facts at issue in these cases. When admitted at trial, prior convictions do not help factfinders make better judgments about witnesses' honesty. Rather, prior convictions prejudice juries who hear about them and consequently lower the burden of proof and make it easier to secure convictions in close cases. These effects are amplified exponentially for witnesses of color who are disproportionately the bearers of prior convictions. In this way, evidence law has become a vehicle for imposing a serious and overlooked collateral consequence on those with prior convictions, one that does a disservice to both truth-seeking and the pursuit of justice writ large.

This report identifies five key reasons for reforming the practice of impeachment with prior convictions. First, impeachment with prior convictions fails on its own terms because it is substantially less probative than prejudicial. Second, prior conviction impeachment deters defendants from offering valuable testimony and steers them away from trial. Third, it compounds the racial inequality embedded in the criminal legal system. Fourth, it functions as a collateral consequence that imposes a lasting, and at times permanent, brand on the character of the person convicted. And finally, prior conviction impeachment imposes such a significant risk of prejudice that it has led to wrongful convictions.

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[1] The three outlier states are Montana (no impeachment of this sort permitted for any witnesses), Kansas (general ban on this sort of impeachment as regards witnesses testifying in their own defense at a criminal trial), and Hawai'i (same). These state practices will be described in more detail below.

The second part of this report offers various recommendations for reform. The first involves eliminating impeachment with prior convictions entirely. Second is a proposed rule that would continue to allow certain evidence of previous lying under oath to be admissible. Third is a less comprehensive reform, which would limit impeachment to convictions for crimes involving dishonesty or false statements. And finally, the report offers reforms focused solely on strengthening protections for those accused of crimes. The first would bar the use of prior conviction impeachment against defendants altogether. The second would allow defendants the continued use of prior conviction evidence against other witnesses.

Finally, this report discusses prior conviction impeachment in Washington State specifically, as a starting point for reform efforts in that state.

I. THE NEED FOR REFORM

A. Prior Conviction Impeachment is Less Probative than Prejudicial

The stated rationale for admitting prior convictions to impeach witnesses is superficially simple. Most courts assert that they tell us something about witnesses' "propensity for truthfulness."[2] There are two theories for why a prior criminal conviction is predictive of future lying: The first rests on the broad assumption that people who are willing to violate the law are less likely to obey other legal commandments, like the courtroom oath.[3] The second, more narrow theory is that people who have committed prior crimes have in some way been dishonest and are therefore more likely to lie in future.

Most jurisdictions automatically admit crimes that are thought to involve dishonesty or false statements. As a result, courts have endlessly parsed which subset of crimes those might be.[4] Still, in many jurisdictions, including

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[2] Julia Simon-Kerr, *Credibility in an Age of Algorithms*, 74 Rutgers U. L. Rev. 111, 116 n.20 (2021).

[3] *See* Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. Davis L. Rev. 289, 301–02 (2008) ("As explained by Justice Holmes, the permitted inferential chain is as follows: (i) a felon has exhibited a character flaw that demonstrates a 'general readiness to do evil;' (ii) a failure to testify truthfully is a species of 'evil;' (iii) a person with a general readiness to do evil is more likely to testify falsely than an average witness.") (citations omitted).

[4] *See* Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(A)(2) and the Origins of Crimen Falsi*, 90 J. Crim. L. & Criminology 1087, 1092 (2000) ("[C]ourts have struggled to determine if offenses such as embezzlement, larceny, blackmail and extortion should qualify as crimes 'involving dishonesty or false statement'"); *see also*

the federal courts, "all felonies [have been considered] at least somewhat probative of a witness's propensity to testify truthfully" and their admission is subject only to a balancing test.[5] This has led courts across jurisdictions to develop a complex jurisprudence dedicated to differentiating the types of crimes that might be more or less probative of truthfulness or untruthfulness.

The probabilistic rationale for admitting prior convictions as evidence of a propensity for untruthfulness is flawed for a number of reasons. As an initial matter, prior convictions are not necessarily the outcome of a well-functioning criminal legal system. It is well known that trials have been replaced by an assembly line of negotiated guilty pleas. There are numerous systemic inequalities that burden a defendant's ability to take matters to trial. Specifically, defendants are often pressured to accept plea bargains in lieu of going to trial.[6] A defendant may choose to forego trial for reasons that have little or nothing to do with guilt or innocence. Those reasons include lack of financial resources, threats of higher sentences, lengthy waits for trial due to overloaded dockets, detention prior to trial when defendants cannot post bond, and uncertainty about the strength of the prosecution's case against them.[7] The disfunction and inequity in the criminal legal system means that criminal convictions cannot be assumed to have a close connection to events on the ground.

The connection between convictions and conduct is further attenuated by the realities of plea bargaining itself. For example, a defendant may maintain their innocence while accepting a plea.[8] Defendants may also accept plea bargains to crimes that have little connection to their actual conduct, often in order to avoid collateral consequences that might come with pleading guilty to crimes that more closely relate to events on the ground.[9] These considerations mean that a defendant's prior conviction often is not a reliable indicator of their previous actions, let alone their propensity for truthfulness.

Separately, because of discriminatory law enforcement practices and prosecutorial discretion, one defendant may have no prior convictions to be

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Patti Duncan, *An Analysis of the Phrase Dishonesty or False Statement as Used in Rule 609*, 32 Okla. L. Rev. 427, 431 (1979) ("[I]t appears generally accepted in the majority of federal courts today that the term 'dishonesty'. . . is descriptive of only those crimes. . . which include deceit, untruthfulness, or falsification. . . However, the state courts that have addressed the issue indicate a trend toward a broader definition… than that applied by the federal courts.").

[5] *United States v. Estrada,* 430 F.3d 606, 617 (2d Cir. 2005).

[6] Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. Rev. 563, 582 (2014).

[7] *Id.* at 582–83.

[8] *Id.*

[9] Thea Johnson, *Fictional Pleas*, 94 Ind. L.J. 855, 856–57 (2019).

impeached with while another may, even if they have engaged in similar behavior.[10] As described further in Part I.C, this is a problem that systematically disadvantages people of color, who are disproportionately subject to policing, prosecution, and conviction.[11]

Even if a prior conviction were a reliable indicator of actual past conduct, the notion that we can learn something about a witness's propensity for lying from the existence of a previous criminal conviction is unproved. Social science research does not support a fundamental premise underlying prior conviction impeachment, namely that a person has a character for truthfulness or untruthfulness. A landmark study from the 1920s illustrated that honesty is not a fixed character trait, but rather a situation-based behavior.[12] Subsequent research has demonstrated not only a low correlation between personality and behavior, but also a low correlation between situation and behavior.[13] The current scientific consensus is that behavior is determined by a combination of personality and situation. Researchers have found that we all have "stable, distinctive, and highly meaningful patterns of variability" in the way we behave across different types of situations.[14] In other words, human character traits are an amalgam "highly sensitive to different features of situations and can adjust their causal activity from one

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[10] *See, e.g.*, Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System, *The Sentencing Project* (April 19, 2018) ("More than one in four people arrested for drug law violations in 2015 was black, although drug use rates do not differ substantially by race and ethnicity and drug users generally purchase drugs from people of the same race or ethnicity."); Montré D. Carodine, *Keeping it Real: Reforming the Untried Conviction Impeachment Rule*, 69 Md. L. Rev. 501, 541–42 (2010) ("[P]rosecutors have tremendous influence in determining criminal defendants' ultimate convictions and sentences. . . While many prosecutors no doubt strive for and in many respects achieve some degree of equity in the criminal process, there is growing evidence. . . that many others use their discretion in ways that yield inequitable results. Often defendants who have committed similar crimes—or even the same crimes—received vastly different treatment.") (citations omitted).

[11] According to the NAACP Criminal Justice Fact Sheet, "[o]ne out of every three Black boys born today can expect to be sentenced to prison, compared 1 out 6 Latino boys; one out of 17 white boys." In addition, "32% of the US population is represented by African Americans and Hispanics, compared to 56% of the US incarcerated population being represented by African Americans and Hispanics." *available at* https://naacp.org/resources/criminal-justice-fact-sheet.

[12] 1 HUGH HARTSHORNE & MARK A. MAY, STUDIES IN THE NATURE OF CHARACTER: STUDIES IN DECEIT 381 (1928) (study of children finding that under a range of situations, very few children were either always honest or always dishonest)

[13] *See* Funder & Ozer, *Behavior as a Function of Situation*, 44 J. Personality & Soc. Psych.107 (1983); Sabini & Silver, *Lack of Character? Situationism Critiqued*, 115 Ethics 535 (2005).

[14] Walter Mischel, *Toward an Integrative Science of the Person*, 55 Annual Rev. Psych. 1, 8 (2004).

activity to the next."[15] Accordingly, most researchers in this area reject a view of people as having straightforward traits of character, such as honesty.[16]

Prior convictions are too amorphous an indicator of the way a person behaves in response to situational inputs to offer meaningful information about whether they are more likely to lie as a witness. Personality researchers agree that only "[b]y measuring a great number of trait-relevant responses for each individual" can we hope to be able to predict future behavior.[17] Furthermore, we can only hope to predict "the mean response that each individual will exhibit over a great number of future observations."[18] In other words, we would have to observe many prior acts very closely in order to make a prediction about how a witness will behave, and that prediction would

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[15] CHRISTIAN B. MILLER, CHARACTER AND MORAL PSYCHOLOGY 100 (2014).

[16] Walter Mischel, *Toward an Integrative Science of the Person*, 55 Annual Rev. Psych. 1, 18 (2004). Research does suggest that people may act with some degree of behavioral consistency, such that lying might be a repeated response to certain stimuli. *See* Urs Fischbacher & Franziska Föllmi-Heusi, *Lies in Disguise—An Experimental Study on Cheating*, 11 J. Eur. Econ. Ass'n 525–547 (2013) (For example, one recent study by a group of economists found that "only about one fifth of people lie fully and act in line with the assumption of payoff maximization." In their experimental study, they found that "[a]bout 39% of the subjects seem to resist the monetary incentives to lie and remain honest. Another 20% of the subjects obviously do not tell the truth but do not maximize their payoff either; we refer to this behavior as partial lying."). *See also* Benjamin E. Hilbigab & Isabel Thielmann, *Does Everyone Have a Price? On the Role of Payoff Magnitude for Ethical Decision Making*, 163 Cognition 15 (2017) (finding that incentive size matters to dishonest behavior but only to certain corruptible individuals); Daniel W. Heck, Isabel Thielmann, Morten Moshagen & Benjamin E. Hilbig, *Who Lies? A Large-Scale Reanalysis Linking Basic Personality Traits to Unethical Decision Making*, 13 Judgment & Decision Making 356, 357 (2018) ("[T]he empirical picture consistently shows that individuals strongly differ in their willingness to lie."). The personality trait labelled "Honesty-Humility" comes closest to what we might label a character for dishonesty. Yet, research shows that this trait is highly situational. Reinout E. de Vries, Anita de Vries & Jan A. Feij, *Sensation Seeking, Risk-Taking, and the HEXACO Model of Personality*, 47 Personality & Individual Differences 536, 539 (2009) (indicating that "Honesty-Humility" falls into "[t]he 'measurable' space of personality"). Kibeom Lee & Michael C. Ashton, *A Measure of the Six Major Dimensions of Personality*, The HEXACO Personality Inventory—Revised, https://hexaco.org/scaledescriptions (last visited Jun. 26, 2022) (describing people with low scores on a test designed to measure levels of "Honesty-Humility" as "inclined to break rules for personal profit," and in some studies to lie for personal gain). These researchers have cautioned that there is a need "on a general level" for "more research" in order to understand the conditions when Honesty-Humility might be predictive of dishonesty itself. Schild, Christoph, et al. "May the Odds—or Your Personality—Be in Your Favor: Probability of Observing a Favorable Outcome, Honesty-Humility, and Dishonest Behavior." Judgment & Decision Making, vol. 15, no. 4, July 2020, pp. 600–10.

[17] LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 110 (2011).

[18] *Id.*

only tell us something about a general pattern of future behavior, not any one particular future act, such as lying on the witness stand. Given the level of specificity needed to predict human behavior, the very breadth of the claim that having a prior felony conviction or a misdemeanor conviction related to dishonesty predicts lying on the witness stand makes it suspect. In the United States, the criminal law targets actions so diverse that there is no unifying theory of criminal behavior, other than that the person has knowingly or unknowingly broken a criminal law.

As described earlier in this report, prior convictions themselves may not accurately reflect the conduct, let alone the character, of their bearers. People with identical behavioral patterns may or may not have prior convictions depending on their race or the neighborhood in which they engaged in the conduct. Making the attempt to trace an empirical connection between prior convictions and lying on the witness stand is complicated by the disparities in the criminal legal system, the reality of wrongful convictions, and the fact that plea bargaining may often result in convictions with only a tenuous connection to events on the ground. In sum, personality research does not support the proposition that a person with a prior conviction admissible to impeach their credibility is more likely to lie when testifying as a witness.[19]

The lack of empirical support for a connection between prior convictions and lying on the witness stand is significant because most jurisdictions require judges to assign a probative value to prior convictions before admitting them. For convictions not thought to involve dishonesty or false statement, most jurisdictions hold that for a defendant in a criminal case the probative value of the conviction must be greater than the risk of unfair prejudice from admitting the conviction. If the witness is not a defendant in a criminal case, the conviction is admissible if the risk of unfair prejudice does not substantially outweigh the probative value. Importantly, no study of how fact-finders actually use prior convictions has found any evidence that they are, in fact, used to assess truthfulness.[20]

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[19] There is a general need for more empirical research by social scientists into this question. The authors expect based on a review of the existing literature that careful studies would fully debunk the notion that prior convictions in and of themselves are predictive of lying on the witness stand.

[20] Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 Cornell L. Rev. 1353, 1359–61 (2009).

Rather, prior convictions have the pronounced—yet wholly impermissible—effect of lowering the burden of proof in close cases, making it easier to convict those with prior convictions.[21] In one study, for example, jurors' discussions of a defendant's *credibility* did not differ depending on whether they were informed of the defendant's prior convictions.[22] Significantly, however, "jurors interpreted the case evidence differently as a result of knowing the defendant's record."[23] The researchers concluded that "determinations of the defendant's credibility are not the prime method by which criminal record influences guilt judgments."[24] Instead, "[t]he evidence against a defendant with a prior record appears stronger to the jury."[25] These empirical results suggest that prior convictions carry an extraordinarily high risk of unfair prejudice.

This has implications for judicial balancing of the probative value of a prior conviction in assessing a witness's propensity for truthfulness as weighed against the risk of unfair prejudice. Even if we hypothesized some marginal increase in fact-finders' ability to predict lies based on the existence of a prior conviction, that would never outweigh the proven near certainty that a fact-finder would instead use the information impermissibly to derive greater moral comfort when convicting the defendant. Indeed, the risk of unfair prejudice almost certainly *substantially* outweighs any slight boost in fact-finders' ability to predict lying from prior convictions. Thus, even if the prior conviction belongs to a witness other than the person on trial, it should fail the more permissive balancing test most jurisdictions accord to witnesses' prior convictions.[26] Because prior convictions lack probative value on the question of truthfulness or untruthfulness, Professor Jeffrey Bellin has argued that if courts were to correctly apply already existing balancing tests within the rules, they should almost always prohibit such impeachment of defendants.[27]

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[21] *See id.* at 1358 ("[T]he threshold for conviction, or the subjective burden of proof, may differ for defendants with. . . criminal records. Jurors may be willing to convict on less evidence if the defendant has a criminal past."); *see also* Michael J. Saks & Barbara A. Spellman, *The Psychological Foundations of Evidence Law* 167–69 (2016) ("[P]rior conviction evidence contributes little or nothing to credibility assessment of defendants who take the witness stand, while at the same time creating the risk that jurors will draw improper propensity inferences.").
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] Bellin, *supra* note 3, at 336.

This same lack of empirical support also discredits the rationale for admitting prior convictions that are thought to involve dishonesty or false statement without any balancing of the probative value as compared with the prejudicial effect. That rationale is that such prior convictions are so probative of dishonesty on the witness stand that they should always be admitted. But social scientific research simply does not support such a claim. Instead, as described in Part I.D of this report, prior convictions are not necessarily indicative of events on the ground.

Further, even when they are thought to involve dishonesty or false statement, prior convictions have no proven ability to predict lying on the witness stand. Indeed, based on the state of personality research, it is likely that a highly nuanced set of information including many of a witness's personality traits, complex situational factors including the likelihood of being believed or detected, and other information like age, for example, would be needed before we might have any hope of any statistical success in predicting lying by witnesses.[28] Such information is well beyond the scope of trial evidence. Prior convictions, whether they are thought to involve dishonesty or not, cannot stand in for the granular information that would be needed to predict future behavior from past conduct. Prior convictions on their own simply cannot suggest a witness's propensity for lying.

B. Prior Conviction Impeachment Deters Valuable (and Constitutionally Protected) Testimony and Trial

The threat of prior conviction impeachment holds the potential to deter those facing criminal charges from exercising their right to testify in their own defense.[29] If they testify, the jury may hear about convictions that would otherwise be excluded (for an example, see Part I.E). Also, if they testify the prosecution's use of their convictions may be more harmful to them than silence. It may suggest to the jury (as the rules permit) that they are untruthful, but it may also suggest that the person in question has a propensity to commit crimes or spur beliefs that this person is "bad" and therefore worthy of being convicted and punished.[30] Legal decision-makers have demonstrated their awareness of the chilling effect of this practice. A

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[28] See, e.g., Schild, Christoph, et al. *supra* note 16, at 600–610.

[29] *See* Eisenberg & Hans, *supra* note 20, at 1357 (finding statistically significant association between the existence of a criminal record and the decision to testify); John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Stud. 477, 491 (2008).

[30] Empirical support exists for the fact that jurors misuse this evidence, to damaging effect. *See* Eisenberg & Hans, *supra* note 20, at 1386.

factor persuading both Hawai'i and Kansas to prohibit the impeachment of those facing criminal charges, as described in Part II.D, was this chilling effect.[31] Similarly, the leading multi-factor test applied by judges deciding whether to permit prior conviction impeachment of defendants includes consideration of "the importance of the defendant's testimony."[32] Yet as Professor Jeffrey Bellin has noted, the case law is often distorted, treating this as a reason to permit such impeachment, rather than—as was originally envisaged—a reason to prohibit it.[33] Indeed, Bellin suggests that one useful reform would be for courts to jettison the multi-factor test and instead stick closely to the language of the rule in question: in his view, a careful analysis of probativeness and prejudicial effect should militate in favor of prohibiting impeachment of defendants almost every time.[34]

The threat of prior conviction impeachment also holds the potential to deter those facing criminal charges from exercising their right to go to trial at all. If the prospect of impeachment impedes the possibility of testimony, or effective testimony, by them or by one or more of their witnesses, they may conclude that pleading guilty is their only option.[35] This adds an important form of leverage to the prosecution's already formidable power to impel guilty pleas.[36] After all, testimony in one's own defense is the testimony that jurors are wanting and hoping to hear.[37] Empirical data supports the notion that jurors punish those who do not offer it,[38] and social science suggests that such testimony may have the potential to offer individuating information that might combat juror biases.[39] In addition, those on trial may lack the funds to retain experts or hire investigators. Thus, the racial and economic disparity involved in the allocation of criminal convictions compounds economic and race-based hardships inflicted on

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[31] The Hawai'i ruling rested on the federal and state rights to testify. *State v. Santiago*, 492 P.2d 657, 661 (Haw. 1971).

[32] *See* Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. Chi. L. Rev. 835, 864 (2016).

[33] *See id*.; Bellin, *supra* note 3, at 325–26.

[34] *See* Bellin, *supra* note 3, at 336.

[35] *See* Carodine, *supra* note 10, at 501, 507, 526 (describing the prior conviction impeachment rule as a "strong ally" of the plea-bargaining system).

[36] *See* Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 432–33 (2018).

[37] *See* Eisenberg & Hans, *supra* note 20, at 1370 ("In the cases in which defendants testified, judges reported that, on average, defendant testimony was more important than that of the police, of informants, of codefendants, and of expert witnesses.").

[38] See Bellin, *supra* note 36, at 426 (collecting the extant empirical data and presenting new empirical research and analysis).

[39] *See* Roberts, *Reclaiming the Importance of the Defendant's Testimony*, *supra* note 32, at 875.

many of those facing charges, and we see a new twist on the old theme of silencing potential witnesses because of race.[40]

The potential reach of this threat is large—a significant population of those on trial have prior convictions, and both prosecutors and judges have regularly proffered and admitted them[41]—but the development of empirical support for the existence of this threat (and its devastating consequences) has been a big step forward. In 2008, Professor John Blume published "The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted."[42] His study focused on a group of people eventually found innocent, who had been convicted—some after plea and some after trial. The primary reason given by their defense counsel for their decision not to testify was the fear that they would be impeached with their convictions if they testified. So eager were they to avoid that threat that they declined to testify (and sometimes to go to trial at all) despite their innocence. In this group of cases, innocence eventually came to light, and governmental actors and evidence were eventually able to be scrutinized. In a much larger group of cases, with no defendant testimony and perhaps no trial at all if the defendant takes a plea deal, governmental actors, evidence, and practices are not subject to community scrutiny.

C. Prior Conviction Impeachment Compounds Racial Bias

The rules of evidence have entrenched a definition of credibility that is not race-neutral. While prior convictions may tarnish credibility in the eyes of laypeople, there is no evidence that people with prior convictions are less likely to tell the truth.[43] And yet, the law invites the introduction of prior convictions under the guise of credibility impeachment. When coupled with

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[40] *See* Jasmine Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2245-46 (2017) ("In the eighteenth through mid-to-late nineteenth centuries, laws barred people of color from testifying in court, especially if the case involved a white person.").

[41] *See* James E. Beaver & Steven L. Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585, 591 (1985) (reporting that level of impeachment by prior convictions is seventy-two percent of all cases in which defendants testify on their own behalf).

[42] John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Stud. 477 (2008).

[43] *See* Saks & Spellman, *supra* note 21, at 167–69; *see also* Beaver & Marques, *supra* note 41, at 589 ("Neither prevailing psychological theories nor existing empirical data supports the argument that someone who has been found guilty of a criminal offense in the past is more likely to lie on the witness stand than someone who has no prior conviction").

this country's record of racist policing[44] and the reality of grossly disproportionate prosecution and conviction of people of color,[45] a policy that introduces prior convictions on the fictional premise that they tell us something about truth must be addressed.

Prior conviction impeachment is nothing short of a continuation of policies that barred witnesses from testifying in American courtrooms by virtue of the color of their skin.[46] Professor Bennett Capers has written that "race is still a factor in credibility determinations."[47] Indeed, one can go further, and state that in today's America, prior convictions are being used systematically to exclude and silence witnesses of color.

More than any other group, African-Americans, and in particular African-American men, are likely to be impeached through prior convictions. The Sentencing Project reports that "in 2010, 8% of all adults in the United States had a felony conviction on their record" but for "African-American men, the rate was one in three (33%)."[48] While African-Americans make up twelve percent of the population, they make up thirty-four percent of the prison population.[49] By contrast, Whites make up sixty-two percent of the population and only thirty-two percent of the prison population.[50] Racially-skewed conviction rates combined with the American legal system's insistence that prior convictions are credibility markers mean that White Americans receive a credibility boost in the courtroom while other groups face a disproportionate risk of being impeached with prior convictions.

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[44] *See What 100 Years of History Tells Us About Racism in Policing*, ACLU (Dec. 11, 2020), https://www.aclu.org/news/criminal-law-reform/what-100-years-of-history-tells-us-about-racism-in-policing (examining four incidents highlighting the issue of racism in policing, from 1919 to 2020).

[45] Leah Wang, Wendy Sawyer, Tiana Herring & Emily Widra, *Beyond the Count: A Deep Dive into State Prison Populations*, PRISON POLICY INITIATIVE (Apr. 2022), https://www.prisonpolicy.org/reports/beyondthecount.html#demographics (describing disproportionate representation of African-Americans in state prisons); Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System, April 19, 2018, https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ (describing racial disparities in prior convictions).

[46] *See, e.g.*, Gonzales Rose, *supra* note 40, at 2255 ("The vestiges of race-based witness competency rules which were based on a 'general distrust of the veracity of blacks' and other people of color persist today.").

[47] I. Bennett Capers, *The Unintentional Rapist*, 87 Wash. U. L. Rev. 1345, 1379 (2010).

[48] Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System, April 19, 2018. https://www.sentencingproject.org/publications/un-report-on-racial-disparities/.

[49] Wang, Sawyer, Herring & Widra, *supra* note 45.

[50] *Id.*

As Part I.A. of this report shows, prior convictions are not predictive of lying in the courtroom. Instead, in cases that go to trial, impeachment with prior convictions has three main effects, none of which relate to believability. First, such impeachment has been shown to lower the burden of proof, making juries more willing to convict defendants with prior convictions.[51] Second, as described in Part I.B, the threat of such impeachment is an important factor in many defendants' decisions not to testify.[52] And finally, prior conviction impeachment incentivizes defendants to agree to plea bargains rather than face a trial in which they must either remain silent or risk their prior convictions being used to lower the burden of proof and render them less sympathetic in the eyes of the jury.[53] Because of the extreme overrepresentation of people of color among those with convictions in the United States, all three of these effects disproportionately affect minoritized groups.[54]

Prior conviction impeachment also impairs the ability of those in marginalized groups with disproportionate rates of conviction and incarceration to vindicate their rights in civil litigation or seek justice when they are the victims of crimes. If people in a particular community are disproportionately more likely to have prior convictions, the friends, neighbors or other witnesses who happened to see a tort or crime will be disproportionately more vulnerable to impeachment with prior convictions. This impeachment, in turn, will impact how those communities engage with both the criminal and civil legal systems. Disproportionate impeachment of witnesses from particular communities, in turn, makes it more difficult for people who live there to vindicate rights in civil court or for the state to prosecute those alleged to have committed crimes against them.[55] As one Southern District of New York judge observed, impeaching victims of crimes with prior convictions may "serve to distract the jury from the crime charged against [the defendant] and instead focus on whether [the victim], as a

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[51] Eisenberg & Hans, *supra* note 20, at 1358 .

[52] Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1461 (2005).

[53] Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 2013 (2016); *see also* Natapoff, *supra* note 52, at 1461-64 (examining impeachment's general silencing of defendants and its effects on plea discussions).

[54] *See* Wang, Sawyer, Herring & Widra, *supra* note 45. ("White people are very underrepresented in state prisons while almost every other racial and ethnic group is overrepresented.").

[55] *United States v. Agostini*, 280 F. Supp. 2d 260, 262 (S.D.N.Y. 2003) ("[K]nowledge of [a] conviction could potentially prejudice the jurors against [the victim], causing them to evaluate his worth as a witness based on his status as a convicted felon regardless of the actual relevance of the Conviction.").

convicted felon, 'deserved' to be assaulted."[56] Again, all of these pernicious effects are coupled with no demonstrated benefit to the truth-seeking process.[57]

Relatedly, because of disproportionate conviction rates, the legal system is almost certainly losing testimony disproportionately from African-American defendants who choose not to testify in order to preserve their right not to be judged based on their prior convictions. Indeed, African-American defendants with prior convictions have been shown to testify less often than white defendants with prior convictions.[58] Yet, when defendants are members of marginalized groups, particularly Black defendants, hearing from them is especially important in order to combat implicit biases and stereotypes that may introduce unfair prejudice into the factfinders' determinations.[59] This is because as humans we think by making automatic inferences about others informed by their appearance as well as by social learning.[60] This can lead to "systematic discrimination against people with particular, often racialized characteristics."[61] If Black defendants are deterred from testifying, jurors and judges may rely even more on visible characteristics like race and make assumptions based on these characteristics

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[56] *Id.*

[57] *See* Saks & Spellman, *supra* note 21, at 167–69 ("The research suggests, then, that prior conviction evidence contributes little or nothing to credibility assessment of defendants who take the witness stand, while at the same time creating the risk that jurors will draw improper propensity inferences.").

[58] Hans & Eisenberg *supra* note 20, at 1372 (finding that among defendants with prior criminal convictions "over 60% of white defendants testified [while] less than half of minority defendants testified").

[59] *See* Montre D. Carodine, *The Mis-Characterization of the Negro: A Race Critique of the Prior Conviction Impeachment Rule*, 84 Ind. L.J. 521, 525–26 (2009) ("[R]ace is evidence inside and outside the courtroom, and most often race is used to make predictive character judgments. [I]n criminal cases. . . blackness equates with poor character. When Blacks are unfairly 'taxed' in the credit system with perceived criminality, Whites receive an undeserved 'credit' with a perceived innocence or worthiness of redemption."); Teneille R. Brown, *The Content of Our Character*, 126 Penn St. L. Rev. 1, 8 (2021).

[60] *See* Brittany S. Cassidy, Leslie A. Zebrowitz & Angela H. Gutchess, *Appearance-Based Inferences Bias Source Memory*, 40 Memory & Cognition 1214, 1214–15, 1223 (2012) ("[P]eople spontaneously rely on facial appearance when forming impressions of others. Appearance-based impressions occur in a seemingly instantaneous way and have important outcomes for the actors in question. . . This suggests that people agree upon initial appraisals of facial characteristics when forming impressions and that these inferences persist in memory. . . Appearance-based inferences reflect perceptual biases and overgeneralization of personality characteristics. . . [I]ndividuals with more stereotypically Black features are more likely to be misremembered as criminals than are nonstereotypical faces. . . Appearance-based inferences about plaintiffs and defendants can influence jury behavior.") (citations omitted).

[61] Brown, *supra* note 59, at 8.

that, in addition to being invalid as a matter of evidentiary fact-finding, are often "inaccurate and unfair."[62] These stereotypes will often connect Black people with "violence, weaponry, hostility, and immorality."[63] Scholars have argued that testimony from Black defendants is an important way to combat such stereotypes, yet impeachment with prior convictions is a persistent barrier to increasing rates of testimony from Black defendants. The result is a system that disproportionately silences Black defendants in the name of credibility impeachment.

D. Prior Conviction Impeachment Treats Conviction as a Lasting or Even Permanent Brand on Character

The practice of prior conviction impeachment treats a conviction as a reliable marker of crime commission. The federal rule, and those state rules that follow it, treat the assumed crime as reliably indicating one of two things: either (in the "crimen falsi" context) a lying character or (in the case of qualifying felony convictions) a character that willfully breaks laws, including the law prohibiting perjury. They treat those assumed character traits as long-lasting. Each of these aspects of the practice is vulnerable to critiques.

1. **Assumed Commission of the Named Crime**

Justifications of this practice rely on the assumed reliability of convictions. This assumed reliability is undermined by wrongful convictions and by aspects of the process leading to convictions, such as the pervasiveness of bias, the under-resourcing of defense counsel, and the pressures to plead guilty, including the "trial penalty" and pre-trial detention.

Professor Roberts has summarized the reasons to question this assumed reliability of prior convictions:

> The use of convictions as impeachment evidence—and indeed their very admissibility despite their hearsay status—rests on an assumption of their reliability. This assumption of reliability is based on the notion that convictions are the product of a fair fight between relatively evenly matched adversaries, culminating in a finding of proof beyond a reasonable doubt. In the vast majority of convictions, however, there is no finding of proof beyond a reasonable doubt. Even if there is, the notion of a fair fight between relatively evenly matched adversaries—or even

[62] *Id.* at 11.
[63] Roberts, *Reclaiming the Importance of the Defendant's Testimony, supra* note 32, at 864.

any fight at all—is increasingly being challenged. The assumption of reliability therefore needs to be reexamined.[64]

2. Assumed Character Traits Associated with Convictions

Elsewhere in the rules of evidence, reliance on propensity reasoning—the notion that X alleged event reveals your character as a Y-kind of person, and thus we can assume you are more likely to have done Z—is disfavored. The system is said to be committed to imposing judgment and punishment based on acts rather than character. Using this type of propensity evidence is anathema to that commitment. Yet propensity reasoning is the sole justification for prior conviction impeachment. As we describe in Part I.A, even if we were to take a conviction for a dishonest act as a reliable indication that a dishonest act had occurred, the notion that it reveals a dishonest character trait that predicts future dishonesty on the witness stand lacks empirical grounding. So does the assumption that a conviction for a felony reveals a character for willful law breaking that predicts dishonesty on the witness stand. Nor does a felony conviction even necessarily require proof—or an admission—of willful law breaking.[65] The incoherence of these rules and their implementation, and their detachment from logic and scientific understandings, make more sense when the practice is seen as a vehicle for historical and ongoing assumptions about who is worthy of belief.[66]

3. Long-Lasting Brand on Character

In the federal system and most of the states, there is no fixed expiration date for impeachment with prior convictions. Although in theory the federal rule makes it harder to impeach with convictions that are more than ten years old, that ten-year marker has been described as arbitrary and too long.[67] Indeed, this kind of lasting brand on character—this translation of the governmental act of conviction into one's lasting identity as a person—is in tension with increased awareness of the opacity, numerosity, severity, and counter-productivity of consequences of conviction that interfere with one's ability to live in ways that are sustainable and protected from stigma. It is also in tension with increased awareness of the racial and economic disparities

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[64] Roberts, *Impeachment by Unreliable Conviction*, *supra* note 6, at 580-81; *see also* Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2510-30 (2020); John D. King, *The Meaning of a Misdemeanor in a Post-Ferguson World: Evaluating the Reliability of Prior Conviction Evidence*, 54 GA. L. REV. 927 (2020).

[65] *See* Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 622-24 (2013).

[66] *See* Simon-Kerr, *Credibility in an Age of Algorithms*, *supra* note 2.

[67] *See* Roberts, *Impeachment by Unreliable Conviction*, *supra* note 6, at 579.

that attend these consequences, not just because of disparate rates of arrest and charging, but because of disparate resourcing of the lawyers who might aid in prevention or diminution of criminal charges and convictions. Impeachment with prior convictions thus attaches a significant, yet often overlooked, collateral consequence to a criminal conviction.

E. Prior Conviction Impeachment Compounds the Risk of Unfair Prejudice and Wrongful Conviction

John Thompson spent eighteen years in prison for a robbery and a murder.[68] For fourteen of those years, he was on death row.[69] Yet, he had committed neither the robbery nor the later murder.[70] Mr. Thompson's story, which involved withholding of evidence by a notorious prosecutor, is in some ways familiar. Yet there is another aspect of Thompson's wrongful conviction that may be equally common yet is much less remarked. That is the role of Thompson's prior conviction for robbery in his later trial for murder.

Thompson was arrested in 1985 after police received a tip from a man named Richard Perkins accusing Thompson and a man he knew, Kevin Freeman, of committing a carjacking and murder.[71] The police arrested both Freeman and Thompson. They found the murder weapon and a ring belonging to the victim in Thompson's possession. Freeman agreed to cooperate with the prosecution and testify against Thompson in exchange for a lighter charge. In the prosecutors' discussions with Freeman, a crucial fact was either not disclosed or ignored: Freeman had recently sold Thompson both the gun and the ring.[72]

After Thompson's arrest, another man saw Thompson's photograph on the news and called the police to accuse him of trying to commit an unrelated robbery.[73] After this new accusation, Harry Connick Sr. decided to try Thompson first on the robbery, "knowing that a conviction could be used

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[68] Radley Balko, Opinion, *John Thompson, an Exoneree and Relentless Voice for Criminal-Justice Reform, has Died*, Wash. Post (Oct. 4, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/10/04/john-thompson-an-exoneree-and-relentless-voice-for-criminal-justice-reform-has-died.
[69] *Id.*
[70] *Id.*
[71] John Thompson, Opinion, *The Prosecution Rests, but I Can't*, N.Y. Times (Apr.9,2011), https://www.nytimes.com/2011/04/10/opinion/10thompson.html.
[72] *Id.*
[73] *Id.*

against him in the murder trial."[74] On the testimony of the robbery victims, all of whom were minors, Thompson was convicted.[75]

Thompson's trial for murder followed. With the evidence of the ring and the gun, and testimony from Freeman and Perkins, Thompson was convicted. What Connick Sr. failed to tell Thompson's lawyer at the time was that blood had been found at the scene of the crime that ruled out Thompson.[76] The existence of this evidence only came to light after an investigator working for John Thompson's defense team discovered it in April 1999, thirty days before Thompson's scheduled execution.[77] Defense attorneys also learned that Perkins had been paid $15,000 by the victim's family.[78]

Back in 1985, however, as predicted by Prosecutor Connick Sr., the robbery conviction did have an effect at Thompson's murder trial. As Thompson himself wrote in 2011:

> After [the robbery conviction], my lawyers thought it was best if I didn't testify at the murder trial. So I never defended myself, or got to explain that I got the [incriminating evidence] from Kevin Freeman.[79]

From this, it seems that Thompson's attorneys didn't want him to testify at his own murder trial because of the risk that the jury would learn about his prior conviction. If Thompson testified, the prosecutor could impeach his credibility with the prior conviction under Louisiana's prior conviction rule.[80] If Thompson remained silent, the prior conviction would not be admissible. Rather than allow the jury to hear about the robbery conviction, defense attorneys counseled Thompson to give up his chance to offer his own compelling, and more importantly, true explanation for why he was found in possession of the gun used in the murder and the victim's ring.

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[74] *John Thompson*, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3684 (last visited Jun. 24, 2022).
[75] *Id*.
[76] *Id.* Another prosecutor in Connick Sr.'s office admitted on his deathbed years later that he and others prosecuting Thompson were aware of the result of the test on the blood sample and chose not to reveal it. The district attorney to whom he made this revelation continued to keep it secret for another five years.
[77] *Id.* At that point, it was corroborated by the district attorney who had heard the information from his colleague in a deathbed confession five years earlier. *Id.*
[78] *Id.*
[79] Thompson, *supra* note 71.
[80] La. Code Evid. Ann. art. 609.1.

Why would Thompson's lawyers counsel such a sacrifice? Being impeached by a prior conviction, as evidence rules almost universally permit, seems preferable to being silenced altogether.[81] Yet, research suggests that when prior convictions are introduced, jurors do not follow their instructions to use them only to assess the truthfulness or untruthfulness of the defendant. Rather, prior convictions have the effect of lowering the burden of proof and making it easier to convict criminal defendants, particularly in close cases.[82] Defense counsel therefore fear, with justification, that if they counsel their clients to testify, and the jury learns about a prior conviction, it will be fatal to the defense. This fear is strong enough to outweigh the possibility that the defendant's decision not to testify will make it impossible to defend against the charges, as happened, with tragic consequences, to John Thompson.

The significance of prior conviction impeachment is underscored in John Thompson's case because the prosecutor strategically chose to prosecute the robbery before the murder in order to have the leverage of the prior conviction to use in the later prosecution. And in the end, Thompson lost his chance to explain the evidence against him, and the legal system lost crucial information that might have averted a terrible miscarriage of justice.

Empirical work on impeachment with prior convictions makes clear that the same Hobson's choice faced by Thompson features frequently in cases that result in wrongful convictions. In Professor John Blume's study of exonerees who declined to testify, the predominant reason their attorneys gave for the choice not to testify was fear of being impeached with prior convictions (see Part I.B).[83] This rationale has support in research on how jurors actually use prior convictions. In a seminal study, Ted Eisenberg and Valerie Hans studied over 300 criminal cases to try to understand how jurors use prior convictions in decision-making.[84] According to evidence rules, prior convictions are admitted solely for the purpose of assessing witness credibility, which courts have understood to mean their propensity for truthfulness. Yet, Eisenberg and Hans were able to find *no evidence* that "criminal records affect defendant credibility."[85] Instead, they found that jurors "appear willing to convict on less strong other evidence if the

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[81] Eisenberg & Hans, *supra* note 20, at 1358.
[82] *Id.*
[83] Blume, *supra* note 29, at 491. *See also* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 NYU L. Rev. 1449, 1459–60 (2005) ("Defendants do not testify largely because it is so dangerous. . . It . . . allows the government to elicit the defendant's criminal history . . . which may dissuade the jury from hearing the substance of the defendant's story, from having sympathy with the defendant, or from disbelieving the government.").
[84] Eisenberg & Hans, *supra* note 20, at 1359–61.
[85] *Id.* at 1386.

defendant has a criminal past."[86] In trying to explain this, they theorized that jurors use the information about past convictions to "categorize the defendant as a bad person, a person of poor character."[87] This, in turn, may create a halo effect that causes the jury to assume the defendant has other negative characteristics.[88] This hypothesis was supported by another finding of the study, which was that jurors reported a lower level of sympathy for the defendant when informed of a prior criminal conviction.[89]

As with the other problems with prior conviction impeachment, racial disparities within the criminal justice system and racial bias on the part of jurors further compound the problem of juries misusing prior conviction evidence. Eisenberg and Hans found that in addition to disparate rates of prior convictions as between defendants of color and white defendants (71% versus 54%), also "[a]bout 6 in 10 whites with criminal records testified, compared to about 4 in 10 minorities with criminal records."[90] One theory they offer to explain that disparity is that "[j]uries in minority defendants' cases were more likely to learn of criminal histories than were juries in white defendants' cases."[91] Although Eisenberg and Hans do not elaborate on this, Professor Simon-Kerr has suggested some possible reasons for the discrepancy. For one thing, "[j]udges may be more willing to admit prior convictions for black defendants or the prior convictions of black defendants may be more likely to fall into categories deemed relevant to credibility."[92] And additionally, "prosecutors may make less effective arguments in favor of admitting the evidence in cases with white defendants or defense attorneys may make less

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[86] *Id.*
[87] *Id.* at 1357.
[88] *Id.* at 1358.
[89] *Id.* at 1387. Studies involving mock jurors bear out this damning conclusion. They find that jurors' perception of the strength of the evidence against a defendant changes when they know the defendant has a prior conviction. *See, e.g.,* Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 L. & Hum. Behav. 67, 76 (1995) ("[M]ock jurors who learned that the defendant had been previously convicted were significantly more likely to convict him of a subsequent offense than were jurors without this information. . . Perhaps the guilty finding by an earlier jury is especially salient to jurors and causes them to make negative inferences about the defendant's character."); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 L. & Hum. Behav. 37, 47 (1985) ("On the basis of the available data, we conclude that the presentation of the defendant's criminal record does not affect the defendant's credibility but does increase the likelihood of conviction.").
[90] Eisenberg & Hans, *supra* note 20, at 1372.
[91] *Id.* at 1374–75.
[92] Julia Simon-Kerr, *Credibility by Proxy*, 85 G.W. L. Rev. 152, 189 (2017).

effective arguments in favor of their being excluded in cases with minority defendants."[93]

II. REFORMS

A. Eliminate Prior Conviction Impeachment

The most comprehensive solution to the problems with prior conviction impeachment outlined in this report is to eliminate the practice entirely. Prior convictions are a metric that is distorted along racial lines, has dubious claims to accuracy, deters valuable testimony from trials harming accuracy, treats prior convictions as a lasting brand on character and compounds the risk of unfair prejudice and wrongful convictions. On evidence law's own existing terms, prior convictions should be inadmissible. They have no demonstrated probative value in predicting truthfulness and untruthfulness of witnesses. To the extent we can extrapolate from social science research into personality and draw conclusions about the predictive nature of prior convictions, they are unlikely to meaningfully increase fact-finders' ability to predict lying. In studies of how fact-finders use prior conviction evidence, it's clear that they are not thinking about them for what they might tell us about truthfulness or untruthfulness, but that instead they serve – improperly – to lower the burden of proof. Under these conditions, prior conviction impeachment is best characterized as a form of regressive social control that undermines effective fact finding. And yet, courts continue to admit prior convictions under the guise of informing fact-finders about the untruthfulness of witnesses.

As Professor Simon-Kerr has suggested in past work, prior conviction impeachment may have endured because it "allow[s] us to declare our opposition to propensity evidence without having to face the consequences of such a prohibition."[94] Providing a backdoor for propensity evidence is not a legitimate reason for impeaching with prior convictions. It is an even worse rationale for perpetuating a doctrine rife with confusion and bias that impedes the fact-finding process when it forces defendants into silence.

Although there are different paths to reform described in this report, the clearest and most effective path is to stop permitting impeachment with prior convictions altogether. This could be done very simply and effectively by eliminating Federal Rule of Evidence 609 and state provisions allowing

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[93] *Id.*
[94] *Id.* at 219.

for impeachment with prior convictions.[95] While there may be increased attempts to admit prior convictions under spurious routes like Federal Rules of Evidence 404(b) or 608 and state equivalents, courts should be alert to such workarounds and find them impermissible.

B. Permit Only Impeachment with Evidence of Lying under Oath

Professor Simon-Kerr has previously proposed that both impeachment with prior convictions AND impeachment with prior bad acts be eliminated. That proposal is worth mentioning here because it includes a rule that maintains the possibility of impeachment for one class of witness. These are repeat players who tell lies under oath in the courtroom.

> Repeat players are important enough to the system that if we hope to keep them honest (and thereby reach accurate conclusions), we may need additional safeguards against the possibility that they will lie. For this reason, in the absence of impeachment rules we may need some mechanism by which to reveal the fact that the repeat witness has lied in similar circumstances before. Particularly in the case of players with institutional power, among them police officers who lie but are not sanctioned or charged with perjury, allowing that information to come to light in a subsequent trial may have salutary effects beyond fact-finding in court, such as incentivizing better behavior.[96]

Thus, reform-minded bodies may wish to consider a modified rule tailored to the problem of repeat players. Such a rule might read as follows:

> EVIDENCE OF LYING UNDER OATH. A witness, not the defendant, may be impeached with evidence that he or she was untruthful about a material matter when making a statement under oath within the past ten years. This provision does not apply to past testimony by a witness as a defendant.[97]

This rule would retain one form of prior conviction impeachment. It would permit a witness, not the defendant, who has been convicted of perjury within the past ten years to be impeached with that conviction.

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[95] Defense counsel would still be able to argue that the right to confront might in some circumstances protect the ability to conduct prior conviction impeachment. *See* Anna Roberts, *Defense Counsel's Cross Purposes: Prior Conviction Impeachment of Prosecution Witnesses*, 87 BROOK. L. REV. 1225, 1239 (2022).
[96] Simon-Kerr, *Credibility by Proxy*, *supra* note 92, at 222.
[97] *Id.*

In addition, the rule would target certain repeat players, who could be impeached with evidence of past lying under oath. For example, police officers are unlikely to be convicted of perjury, but there may be findings that they lied during previous judicial proceedings. Improved record keeping in the wake of scandals surrounding police conduct may make it easier to track and access such findings and bring them to bear when those same police officers are later testifying at trials.[98] The rule might also encompass experts who testify regularly in court. If such experts were found to be untruthful in past testimony, they would be subject to impeachment.[99] And the rule could also have some bite for others who appear in court with some regularity, whether litigious pro se plaintiffs or corporate officers.

The standard for applying this form of impeachment would be the conditional relevance standard that applies anytime a prior bad act is sought to be introduced in court.[100] Under Rule 104(b) of the federal rules and state analogues, the judge should admit prior acts if there is "proof sufficient to support a finding that the fact does exist." Thus, the proponent would need to show "that the prior testimony was both material and untruthful."[101] Extrinsic evidence would be permissible so long as it was otherwise admissible at trial, and the factfinder would have an opportunity to determine whether the material lie took place. As Professor Simon-Kerr explained when proposing this rule, it is:

> sufficiently limited in scope . . . that coupled with judicial authority to limit the number of witnesses on a subject, it should not represent a substantial burden on trials. And any burden will be de minimis in comparison with the time spent and cost incurred currently by impeachment with prior crimes, bad acts, reputation, and opinion.[102]

Finally, the rule's carveout for defendants must be explained. Defendants are excluded from impeachment under this rule because of the problem that "the jury should (and will) instead focus on the intertwined

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[98] Of course, this makes record-keeping about prior lies in judicial proceedings paramount, and police departments have been reluctant to keep such records. The Law Enforcement Accountability Project is one attempt to rectify this by keeping and making accessible records of lying and other malfeasance by law enforcement. https://www.nacdl.org/Document/Law-Enforcement-Accountability-Database-Project.

[99] Simon-Kerr, *Credibility by Proxy, supra* note 92, at 223. Such findings might be made judicially or by a professional review board. *Id*.

[100] *Huddleston v. United States*, 485 U.S. 681, 690 (1988).

[101] Simon-Kerr, *Credibility by Proxy, supra* note 92, at 223.

[102] *Id.*

question of guilt."[103] In other words, as a United Kingdom court explained when it severely restricted impeachment of defendants with prior convictions, "whether or not a defendant is telling the truth to the jury is likely to depend simply on whether or not he committed the offense charged."[104] Jurors will assume a guilty defendant is lying whether or not there is prior conviction evidence, and, as studies have shown jurors will take prior convictions as evidence of guilt. Thus, impeachment with evidence of lying under oath is not really possible for criminal defendants because factfinders are unable to separate the question of lying from the question of guilt.

C. Permit Only Impeachment with Prior Convictions Involving Dishonesty or False Statement

Of course, the wholesale reforms just described may be too comprehensive to be politically palatable. One more modest approach might be to preserve impeachment with prior convictions for crimes that involve a dishonest act or false statement. This form of impeachment is permitted without any balancing under Federal Rule of Evidence 609(a)(2) and some state analogues. This approach may be appealing in the sense that it offers a wider lane for admission of the types of prior convictions that are most widely seen as probative of a witness's truthfulness or untruthfulness. There are two main difficulties with such an approach. First, courts have endlessly debated how to define the crimes that involve dishonesty or false statement. Second, other than lying previously in court, such prior convictions have just as little demonstrated empirical connection to predicting lying as any other types of convictions.

If a jurisdiction chooses to take this option, we recommend a rule that is as narrowly tailored as possible. It should take a specific subset of crimes and categorize those as convictions that may be used for later impeachment, leaving no room for debate about the inclusion of other crimes in the category. The drafters of the federal rules provide a helpful list, describing crimes that fall into this category as "perjury or subordination of perjury, false statement, criminal fraud, embezzlement or false pretense."[105] This list is workable and can serve as a starting point for discussion about what crimes to include. The inclusion of fraud makes this a fairly capacious definition, and may also introduce ambiguity into the rule, depending on a jurisdiction's

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[103] *Id.* at 211.

[104] *R v. Campbell* [2007] EWCA (Crim) 1472 [30]. This important opinion foreclosed impeaching defendants with prior convictions in most situations in the United Kingdom. *See* MIKE REDMAYNE, CHARACTER IN THE CRIMINAL TRIAL 6 (Oxford 2015).

[105] F.R.E. 609 Notes of Committee on the Judiciary.

definition of fraud. Ultimately, we advise any jurisdiction contemplating such a reform to carefully consider its criminal code and select a subset of crimes that are easily defined and narrowly tailored. Such tailoring could focus on convictions for crimes that require intentional lying, such as perjury or false statement.[106] The tailoring could also exclude convictions that are the result of plea bargains, given the ambiguities surrounding convictions that are the result of a plea.[107]

However lines are drawn if choosing this path, clear lines are essential if a jurisdiction wishes to avoid a doctrinal morass. The drafters of the federal rules did not stop at a defined list of crimes that are impeachable under Rule 609(a)(2). Instead, they included "any other offense, in the nature of crimen falsi the commission of which involves some element of untruthfulness, deceit, or falsification."[108] Many states followed suit in their codes of evidence. This vague and expansive list has created interminable debate in the doctrine attempting to distinguish crimes with an element of untruthfulness from those that lack such an element. Such parsing in some sense reduces to the question whether all forms of criminal behavior are somehow "dishonest," and if not, where the lines should be drawn. For some courts, it has proved difficult to see a distinction. For example, the South Carolina Court of Appeals once included any form of stealing within the category of crimes that are automatically admissible for impeachment because they involve dishonesty or false statement. The court explained tautologically that "[s]tealing is defined in law as larceny," and "[l]arceny involves dishonesty."[109]

Limiting impeachment exclusively to crimes involving dishonesty or false statement will lead those seeking to impeach witnesses to try to fit their prior convictions into that category. Even without this increased pressure to admit prior convictions under Rule 609(a)(2), courts are unclear what crimes involve dishonesty or false statement. Frequent sources of disagreement include whether petty theft, such as shoplifting, is related to dishonesty and whether drug offenses relate to dishonesty.[110] For example, the Colorado Supreme Court has held, citing "common experience," that "a person who

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[106] Of course, sometimes lying is altruistic, as in the case of a parent who falsely takes responsibility for a criminal act committed by a child. But a jurisdiction wishing to connect prior crimes involving dishonesty with future lying on the witness stand would not have the luxury of exploring the cause of the dishonest criminal activity.

[107] *See supra* Part I.A.

[108] F.R.E. 609 Notes of Committee on the Judiciary.

[109] *State v. Al-Amin*, 578 S.E.2d 32, 41 (S.C. Ct. App. 2003), overruled by *State v. Broadnax*, 779 S.E.2d 789, 793 (S.C. 2015).

[110] Simon-Kerr, *Credibility by Proxy*, *supra* note 92, at 197.

takes the property of another for her own benefit is acting in an untruthful or dishonest way."[111] This meant that a complaining child witness in a sexual assault case could be impeached with evidence that she had stolen $100 in goods the previous summer. At the same time, District of Columbia courts have held that drug possession involves dishonesty and false statement within the meaning of the D.C. Code of Evidence. In fact, the D.C. Code's legislative history suggests that all crimes involve dishonesty or false statement unless they are crimes "of passion and short temper, such as assault."[112] This report could offer more examples of the doctrinal chaos and potential for courts to slot almost any crime into the category of one involving dishonesty or false statement, but that work has mercifully already been done.[113]

The point is simply that a jurisdiction wishing to provide meaningful reform must be extremely clear about what subset of crimes are admissible as crimes involving dishonesty or false statement. There can be no ambiguity and the only discretion should be for the judge, who can still exclude the evidence if the probative value does not outweigh the risk of unfair prejudice. A sample rule along these lines is offered below:

> IMPEACHMENT BY EVIDENCE OF A CRIMINAL CONVICTION. A witness, not the defendant, may be impeached with evidence that he or she was convicted of perjury or subordination of perjury, false statement, embezzlement or false pretense within the past ten years if the probative value of the conviction outweighs the risk of unfair prejudice.

A simple probative versus prejudicial balancing test is included in this rule for reasons given in greater depth in Part I of this report. Prior convictions are almost certainly highly prejudicial. Jurors may take them to be an indication that a witness is a bad person rather than for what they might show about a witness's truthfulness. This is particularly problematic for defense witnesses, whose prior convictions may tarnish the defendant by association. At the same time, prior convictions have only speculative probative value on the question of truthfulness or untruthfulness. Thus, a judge should make sure that the speculative probative value outweighs the very real danger of unfair prejudice before admitting the prior conviction. Rule drafters should be clear that this balancing test is applied rigorously and not skewed in favor of

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[111] *People v. Segovia*, 196 P.3d 1126, 1131 (Colo. 2008).
[112] Simon-Kerr, *Credibility by Proxy*, *supra* note 92, at 201; *Durant v. United States*, 292 A.2d 157, 160–61 (D.C. 1972).
[113] *See* Simon-Kerr, *Credibility by Proxy*, *supra* note 92, at 196-203 (offering more examples).

admission. This is a real risk. As Professor Roberts has shown, the balancing tests incorporated within FRE 609 have over time been distorted in favor of admitting prior convictions.[114]

Excluding defendants from the ambit of the rule is important for the reasons outlined in greater length in the previous subsection. In short, factfinders are unable to separate the question of whether a defendant is lying from the question of the defendant's guilt. To repeat the explanation offered when UK courts largely abandoned the practice of impeaching criminal defendants with prior convictions, "whether or not a defendant is telling the truth to the jury" is likely to be hopelessly intertwined with the ultimate issue in the case.[115] Thus, impeachment with prior convictions, even those that involve dishonesty, is not possible for criminal defendants.

D. Prohibit Impeachment with Prior Convictions of Defendants in Criminal Cases

Another approach to reform focuses squarely on the problem of impeaching defendants in criminal cases with their prior convictions. This approach might insist that whatever (if anything) might be permitted as regards impeachment of witnesses *in general* with prior convictions, this practice must be prohibited as regards the impeachment of those facing criminal charges.

First, while many of the criticisms of this practice apply across the board—for example, the weight and meaning given to criminal convictions, and the way in which this practice contributes to the vast array of lasting reminders of criminal convictions[116]—many carry most weight as regards the impeachment of criminal defendants. For example, deterrence of the testimony of criminal defendants appears more likely than that of other witnesses[117]—and is more problematic. So, too, the risk of propensity reasoning, and/or activation of feelings of contempt toward the witness, is most troubling in the case of someone facing criminal charges. The risk that the evidence will be taken as substantive evidence of guilt and thus propel a guilty verdict and its consequences is unique to defendant-witnesses.[118] The

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[114] *See* Anna Roberts*, Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping,* 83 U. CHI. L. REV. 835, 864 (2016).
[115] R v. Campbell [2007] EWCA (Crim) 1472 [30].
[116] *See* Roberts, *Defense Counsel's Cross Purposes, supra* note 95, at 1230-31, 1235 (2022).
[117] Other witnesses can potentially be compelled to testify, for example.
[118] This risk was part of what motivated the Hawai'i Supreme Court. *Santiago*, 492 P.2d at 659.

experimental evidence suggesting improper uses by jurors of this kind of evidence has been focused on the context of jury assessments of those facing criminal charges.

Second, those facing criminal charges are endowed with a set of constitutional protections to which other witnesses are not entitled. They have the right to a fair trial, to due process, to put on a defense, to testify, to an impartial jury, and to equal protection; state constitutions may mirror or go above the federal threshold in their protections. This helps remind us that even though the allure of "symmetrical" arrangements may be strong, the criminal system is fundamentally asymmetrical, in its protections as in the stakes involved.[119] The federal regime acknowledges the importance of asymmetry, with a more protective balancing test when it is the impeachment of criminal defendants being contemplated.

Three states have (with some caveats) prohibited the impeachment of criminal defendants with their convictions: Kansas and Hawai'i, which permit some impeachment of other witnesses with their convictions,[120] and Montana, which has prohibited this for all witnesses.[121] The Hawai'i Supreme Court precipitated that state's change with a finding of a state and federal constitutional violation.[122] It may be that analogous federal constitutional arguments are stronger now than then, since the Supreme Court

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[119] As Professor Roberts has said, "the criminal justice system is filled with asymmetries that correspond to the vast difference in situation between the defense and the prosecution." Roberts, *Conviction by Prior Impeachment*, *supra* note 53, at 2034-35.

[120] Haw. R. Evid. 609 ("(a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is inadmissible except when the crime is one involving dishonesty. However, in a criminal case where the defendant takes the stand, the defendant shall not be questioned or evidence introduced as to whether the defendant has been convicted of a crime, for the sole purpose of attacking credibility, unless the defendant has oneself introduced testimony for the purpose of establishing the defendant's credibility as a witness, in which case the defendant shall be treated as any other witness as provided in this rule"); Kan. Stat. Ann. §60-421 ("Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his or her credibility. If the witness be the accused in a criminal proceeding, no evidence of his or her conviction of a crime shall be admissible for the sole purpose of impairing his or her credibility unless the witness has first introduced evidence admissible solely for the purpose of supporting his or her credibility").

[121] Mont. R. Evid. 609 ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.") In all three states, this form of impeachment may be permitted if the defendant is found to have opened the door to it. Roberts, *Conviction by Prior Impeachment*, *supra* note 53, at 2027.

[122] *See Santiago*, 492 P.2d at 661("[T]o convict a criminal defendant where prior crimes have been introduced to impeach his credibility as a witness violates the accused's constitutional right to testify in his own defense").

has now articulated more squarely a constitutional right to testify in one's defense.[123] The Hawai'i Supreme Court relied in part on fears that jurors do not use this evidence correctly, even when instructed on how to do so;[124] subsequent studies have added support to those fears.[125] And Washington judges have proposed following the lead of these states, for reasons that include constitutional ones.[126]

Advancing this kind of proposal may well require addressing some of the common arguments in support of permitting impeachment of those facing criminal charges. These include the notion that without this form of impeachment, jurors will lack vital information, and will wrongly assume that the person on trial is a "Mother Superior."[127] The pages above help reveal some of the weaknesses in these arguments. For example, jurors commonly assume the guilt of the person charged.[128] Scholars have suggested that jurors may also assume a criminal background when they assess defendants,[129] and particularly Black defendants. They also have every reason to doubt the veracity of defendant testimony, and the prosecution can attempt many other kinds of impeachment. To hear about a conviction and thus to have the defendant-witness branded less credible than others who have not been so impeached is to erase the race- and class-disparities of the doling out of

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[123] *See Rock v. Arkansas*, 483 U.S. 44, 44 (1987).
[124] *See Santiago,* 492 P.2d at 660.
[125] *See* Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 323-24 (2013) (finding "no data-based reason" to conclude that it is more difficult for jurors to follow instructions regarding confessions—an area in which the Supreme Court has acknowledged that jury instructions may fail to cure prejudice—than with respect to prior convictions).
[126] *See, e.g.*, *State v. Burton*, 676 P.2d 975, 986 (Wash. 1984) (Brachtenbach, J., dissenting) ("Furthermore, even if prior convictions were relevant to credibility, I question whether ER 609 can be applied to the defendant in a criminal action without seriously prejudicing his right to a fair trial."); *id.* at 988-89 ("I conclude that our present ER 609 should be abandoned and replaced with a rule modeled after the Kansas, Hawaii, Georgia and Montana rules. At a minimum, this new rule should provide that no prior convictions shall be admissible to impeach the credibility of a defendant in a criminal action, unless the defendant has first introduced evidence solely for the purpose of supporting his credibility. *See* Kan.Stat.Ann. § 60–421 (1976). I suggest we go one step further and adopt Montana's proscription against impeaching *any* witness with *any* prior conviction. This would relieve our courts of the pointless exercise of attempting to determine which crimes involve 'dishonesty or false statement,' or otherwise impugn the credibility of the witness. I would, however, add to the Montana rule a clause expressly providing that any prior conviction could be introduced to impeach the testimony of a witness who had first introduced evidence to support his own credibility").
[127] *See* Roberts, *Conviction by Prior Impeachment*, *supra* note 53, at 1999.
[128] *Id.* at 2000.
[129] *See* Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 527 (2011).

convictions; in addition, if studies suggesting that Americans commit multiple felonies daily are accurate,[130] it could be argued that any witness testimony *without* prior conviction impeachment conveys a misleading impression of law-abiding behavior. Studies indicate that jurors use this evidence not for the permitted purpose, but for prohibited purposes.[131] And the threat of prior conviction impeachment may lead to a guilty plea, in which case jurors get *no information at all*, because no trial occurs.

Professor Roberts has proposed a model statute that states advancing this priority might wish to consider:

> In a criminal case where the defendant takes the stand, the prosecution shall not ask the defendant or introduce evidence as to whether the defendant has been convicted of a crime for the purpose of attacking the defendant's credibility. If the defendant denies the existence of a conviction, that denial may be contradicted by evidence that the conviction exists.[132]

E. Permit Defendants in Criminal Cases to Impeach the Witnesses Against Them

Another approach—not necessarily inconsistent with the previous proposal—is to insist that whatever (if anything) is permitted as regards impeachment by civil parties or by the prosecution, those facing criminal charges not be prohibited from impeaching the witnesses against them.[133]

One way to accomplish this is through a rule that refers explicitly to the fact that the defense may be able to claim a constitutional right to conduct this sort of impeachment. A model exists in FRE 412, which generally excludes certain evidence about complainants in cases alleging sexual misconduct, but carves out evidence "whose exclusion would violate the defendant's constitutional rights."[134] In neither context is an explicit

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[130] *See* Roberts, *Impeachment by Unreliable Conviction*, *supra* note 6, at 589.
[131] *See* Eisenberg & Hans, *supra* note 20, at 1386.
[132] Roberts, *Conviction by Prior Impeachment*, *supra* note 53, at 2036.
[133] *See* Roberts, *Defense Counsel's Cross Purposes, supra* note 95, at 1238-41 (citing cases that have found for the defense on the issue of whether a denial of prior conviction impeachment constituted a violation of the right to confront, and mentioning non-constitutional reasons why one should hesitate before advocating that the defense lose a litigation tool such as this).
[134] Fed. R. Evid. 412(b)(1) (stating that in a case involving alleged sexual misconduct certain evidence relating to the complainant is generally inadmissible, but may be admitted in a criminal case where "exclusion would violate the defendant's constitutional rights").

statement of this sort technically necessary, since of course constitutional protections exist regardless of evidentiary rules, but an explicit carveout serves as a reminder, and perhaps as a catalyst for vigorous litigation relating to the constitutional contours. Thus, a rule of this sort might declare that impeachment by prior conviction is prohibited, except where the exclusion of such evidence would violate the defendant's constitutional rights.

The regime in Montana is illustrative of the fact that where a rule appears to prevent this form of impeachment by the defense, litigation under the Confrontation Clause will follow. Defense claims of a Confrontation Clause violation have been rejected in that state,[135] but they might prove more successful were other states to prohibit this form of impeachment. When explaining its decision to prohibit this form of impeachment as to all witnesses, the Montana Commission responsible for drafting the rule noted that the Montana Constitution and a state statutory provision provided that "when a person is no longer under state supervision, his full rights of citizenship are restored."[136] Thus there would be little use to a rule like FRE 609 because it would permit the impeachment of only a small category of people: "those persons serving a sentence in prison, suspended sentence or on parole."[137] Confrontation Clause arguments might have more traction in a state where there is more for the defense to lose.

Of course, regardless of the approach taken to prior conviction impeachment, defendants may always seek to introduce prior convictions of witnesses if they are relevant to proving the witness's bias or if they show inconsistencies in a witness's testimony, for example. Such evidence is generally admissible – subject to balancing under Rule 403 or state analogues – because it is relevant through a non-propensity theory. There is no need for a special rule permitting impeachment with prior convictions when prior convictions will be introduced to show bias or inconsistencies, or otherwise serve as direct, rather than propensity, evidence that there is reason to be mistrustful of a witness. Thus, defendants' ability to show that witnesses against them are biased because of a plea agreement in exchange for testimony, for example, does not depend in any way on a rule permitting impeachment with prior convictions.

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[135] *See State v. Doyle*, 160 P.3d 516, 526-27 (Mont. 2007) (resolving state and federal confrontation right objection to Montana regime by finding that the right to confront was not violated by the court's limitation of cross-examination based on Montana's Rule 609); *see also State v. Gollehon*, 864 P.2d 249, 259 (Mont. 1993).

[136] *See* Roberts, *Conviction by Prior Impeachment*, *supra* note 53, at 2027.

[137] *Id.*

III. WASHINGTON STATE

A. The Rule

The central component of Washington's Evidence Rule 609 reads as follows:

*ER 609(a). **General Rule**. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime*

(1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or

(2) involved dishonesty or false statement, regardless of the punishment.[138]

This rule provokes the same concerns mentioned in the main body of this report. It also contains a provision that differs from the Federal Rule of Evidence and that has caused Washington courts particular difficulties: the provision relating to "crime[s that] . . . involved dishonesty or false statement." This section will describe judicial opinions raising concerns that mirror those mentioned earlier, and then will focus on the particularly vexing provision.

B. Washington Courts Raising Widely Shared Concerns

Despite the decision to treat all witnesses equally in the language of the rule, Washington Supreme Court cases have repeatedly remarked upon the dangers of this practice for people charged with crimes and asserted a commitment to a narrow reading of the rule when the proposed impeachment would affect that category of witness.[139]

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[138] FRE 609(a). For a full version of the rule, see https://www.courts.wa.gov/court_rules/pdf/ER/GA_ER_06_09_00.pdf.

[139] *See, e.g.*, *State v. Garcia,* 179 Wash.2d 828, 847 (2014); *State v. Newton,* 109 Wash.2d 69, 70 (1987) ("Reference to prior crimes for impeachment purposes in a criminal trial has extraordinary potential for misleading and confusing a jury into believing it is being told that defendant is a 'bad' person and therefore guilty of the crime charged"); *State v. Vazquez,* 198 Wash.2d 239, 252-53 (2021) ("Generally speaking, evidence of prior felony convictions is .

Several courts have invoked constitutional concerns about the use of this practice against those facing criminal charges.[140] Notable is a lengthy dissent by Justice Brachtenbach in Burton, calling for the abolition of the practice with regard to criminal defendants in Washington (and suggesting it with regard to all witnesses), citing the rules in Kansas, Hawai'i, and Montana, and many scholarly sources. Among many other concerns, he raised the right to a fair trial, and mentioned that this reform would relieve the courts of "the pointless exercise" of deciding which convictions to admit.[141] A concurring justice in a later Washington Court of Appeals case expressed agreement with Brachtenbach's dissent, arguing for abolition of this form of impeachment.[142]

C. Washington Courts Vexed by the "Dishonesty or False Statement" Provision

Washington's rule has language that is more permissive than the federal rule in its second category of admissible convictions, in that the crime of conviction needs only to have *involved* dishonesty or false statement. By contrast, the federal provision is restricted to situations where the court can "readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement."[143] Like the federal version, Washington's ER 609(a)(2) has been interpreted to leave a trial judge without discretion to weigh the prejudicial effect of a qualifying conviction.[144]

Some courts have discussed the history of ER 609 to inform their interpretation of ER 609(a)(2). Burton, for example, notes that the Washington Supreme Court adopted ER 609 in 1979, superseding former RCW 10.52.030, which had appeared to make witness convictions admissible

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. . inadmissible against a defendant because it is not relevant to the question of guilt yet very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes. This is especially so in cases where the defendant is the witness because it tends to shift the jury focus from the merits of the charge to the defendant's general propensity for criminality. If the jury learns that a defendant previously has befen convicted of a crime, the probability of conviction increases dramatically.") (internal citations omitted).

[140] *State v. Hardy*, 133 Wash.2d 701, 710-11 (1997) (citing scholarly literature mentioning the right to testify); *State v. Burton,* 101 Wash.2d 1, 9-10 (1984) (mentioning right to testify); *id. at* 18, 23 (Brachtenbach, J., dissenting); *Newton* 109 Wash.2d at 73-74.

[141] *Burton* 101 Wash.2d at 23.

[142] *State v. White,* 43 Wash.App. 580, 588 (1986) (Williams, J, concurring) (noting the heavy intellectual burdens on judges in attempting the probative/ prejudicial balancing).

[143] FRE 609(a)(2).

[144] *Newton* 109 Wash.2d at 79.

without limitation by type.[145] In adopting ER 609, the Court chose to move away from that regime and impose more restrictions on this form of evidence.[146] ER 609 used the language of FRE 609 (at that time) word for word.[147]

Early case law held out for a narrow interpretation of ER 609(a)(2), to match the federal version that inspired it.[148] Burton chose a "restrictive" approach to the provision, noting that an expansive ER 609(a)(2) would render ER 609(a)(1) superfluous.[149] Burton stated that the category of crimes involving "dishonesty" includes "only those crimes having elements in the nature of *crimen falsi*, the commission of which involves some element of deceit, fraud, untruthfulness or falsification bearing on the accused's propensity to testify untruthfully."[150] The court found that it was error to admit convictions for petit larceny and shoplifting, since "crimes of theft in general do not contain the requisite element of untruthfulness."[151]

Subsequently, Ray abandoned Burton and found that crimes of theft involve dishonesty and are *per se* admissible for impeachment purposes under 609(a)(2).[152] The expansive readings of this rule continued with McKinsey, 116 Wash.2d 911 (1991) (conviction for first degree possession of stolen property *per se* admissible under 609(a)(2)), State v. Rivers, 129 Wash.2d 697 (1996) (robbery and attempted robbery *per se* admissible under 609(a)(2)), and Garcia (permitting the trial judge to examine the "facts" of the underlying burglary conviction in the court file to determine 609(a)(2) admissibility, and stating that if the predicate crime was theft, a burglary conviction may be admitted under 609(a)(2)).

Thus, the Washington interpretation of ER 609(a)(2) has expanded its scope from its origins. By contrast, the federal system, whose language was originally the same as Washington's, amended its rule to narrow the scope of FRE 609(a)(2).[153]

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[145] *Burton* 101 Wash.2d at 3-4.
[146] *State v. Ray*, 116 Wash.2d 531, 556 (1991) (Dolliver, J., concurring and dissenting).
[147] *Id*.
[148] *Burton* 101 Wash.2d at 6; *Newton* 109 Wash.2d at 76 (mentioning an initial interpretation that was "extremely narrow").
[149] *Burton* 101 Wash.2d at 10.
[150] *Id*.
[151] *Id*. at 10.
[152] *State v. Ray*, 116 Wash.2d 531, 545 (1991).
[153] *See* Fed. R. Evid. 609(a)(2).

CONCLUSION

As scholars who have been writing about prior conviction impeachment for years, we formed the Prior Conviction Impeachment Reform Coalition—a group consisting of leading scholars in this area—because we wanted the numerous critiques of this practice to provide the fuel for change. We seek opportunities throughout the states and at the federal level to contribute our energy and expertise to this project, whether through scholarship, amicus briefs, resource sharing, training of judges or advocates, public education, and reports such as this one. We hope to hear from those who have suggestions for us, those who might want to work with us, and those whom we might help.

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